No. 02-1080

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IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, THE HR POLICY ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES, AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council, LPA, the HR Policy Association, The Chamber of Commerce of the United States, and the American Benefits Council respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

urges this Court to reverse the decision below, and thus supports the position of the petitioner, General Dynamics Land Systems, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 340 of the nation's largest private sector corporations, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, the HR Policy Association ("LPA"), is a public policy advocacy organization representing corporate executives responsible for human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion about current situations and emerging trends in labor and employment policy. LPA members are typically companies with business operations in the United States that have more than $750 million in revenues and more than 2,500 employees. The total number of persons employed by LPA member companies in the United States is nearly 13 million Americans, more than 12 percent of the private sector workforce. A large share of LPA members currently provide retiree health care for their employees. In light of rapidly increasing health care costs, LPA has a keen

interest in ensuring that employers have sufficient flexibility with respect to health benefits, thus enabling them to provide some measure of coverage in the future.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The American Benefits Council ("ABC") is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, ABC members either sponsor or provide services to retirement and health plans covering more than 100 million Americans.

All of EEAC's and LPA's, and many of the Chamber's and ABC's members, are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, *amici's* members have a strong interest in the issue presented for the Court's consideration—whether the ADEA provides a cause of action for "reverse" discrimination for someone who claims that an older worker was treated more favorably.

Thus, *amici* seek to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the parties have not raised. Because of their experience in these matters,

amici are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Under the collective bargaining agreement negotiated between petitioner General Dynamics Land Systems, Inc. ("General Dynamics") and the United Auto Workers ("UAW") that was in effect prior to July 1, 1997, General Dynamics provided full health insurance benefits to retired workers with 30 years of seniority. Petitioner's Appendix, at 3a. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement, which obligated General Dynamics to offer retiree health benefits only to employees who were at least 50 years old as of July 1, 1997, the date the new agreement took effect. *Id.*

The respondents are current and former employees of General Dynamics who were between 40 and 50 years old on July 1, 1997. *Id.* Each of the respondents would have been eligible for retiree health benefits under the collective bargaining agreement in effect before July 1, 1997, but did not qualify for benefits under the new agreement. *Id.* Respondents sued General Dynamics, alleging that limiting the availability of retiree health benefits to employees 50 years old and over constituted age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*

The United States District Court for the Northern District of Ohio dismissed respondents' complaint. The district court reasoned that an allegation that older workers received more favorable treatment than younger workers was a claim for "reverse" age discrimination, which was not actionable under the ADEA. Pet. App. 4a. A divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed. In the majority's view, the ADEA bars employment discrimination against any

individual 40 or older on the basis of age, regardless of whether older or younger workers received more favorable treatment. Petitioner sought and was granted this Court's review of the Sixth Circuit's decision.

SUMMARY OF ARGUMENT

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, does not support a claim for "reverse" age discrimination for someone who claims that a comparatively older worker was treated more favorably. By referring specifically to the problems faced by "older workers," particularly in relation to younger employees, the plain language of the statute precludes reverse discrimination claims. Therefore, an employer that favors older employees has not discriminated on the basis of age. The Sixth Circuit's interpretation of the statute and an Equal Employment Opportunity Commission (EEOC) regulation on comparative age to permit a claim of reverse age discrimination conflicts with the plain language of the statute. Moreover, the EEOC's regulation on comparative age is fundamentally inconsistent with both the statutory language and the next section of the regulation, and therefore deserves no deference from this Court.

Reverse discrimination claims also are incompatible with the ADEA's legislative history, which reveals an intent to promote employment opportunities for *older* workers vis-à-vis younger ones in light of the harmful and inaccurate stereotypes about the declining work capabilities associated with advancing age. The problems and stereotypes that older employees reportedly continue to experience in some workplaces thirty-five years after the passage of the ADEA further support interpreting the statute to prohibit only situations in which older workers are discriminated against in favor of younger ones. Moreover, employment actions that favor older workers are not based on the negative stereotypes against older workers that Congress intended the ADEA to combat.

As a practical matter, the decision below severely prejudices employers by subjecting them to significantly more, and potentially conflicting, discrimination claims over personnel actions. At the same time, it significantly weakens their ability to defend against such claims. The Sixth Circuit's ruling also jeopardizes employer-sponsored benefit plans. By removing the flexibility employers need to manage benefit programs in light of escalating costs, the decision below may force employers to reduce or eliminate completely many benefits that they voluntarily make available to their workers, an undesirable result for all workers, regardless of their age.

ARGUMENT

I. THE ADEA DOES NOT SUPPORT A CLAIM FOR "REVERSE" AGE DISCRIMINATION

A. The ADEA's Plain Language Precludes Reverse Discrimination Claims

1. The ADEA's statutory language prohibits only discrimination against older employees

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, prohibits employment discrimination against older workers who are age 40 and above on the basis of their age. The plain language of the ADEA indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored. In the congressional statement of findings and purpose at the beginning of the ADEA, Congress specifically referred to the problems faced by "older workers" and "older persons," particularly "relative to the younger ages" as the motivation for the statute. 29 U.S.C. § 621. This language memorialized Congress's intent to protect workers who were discriminated against *because they were considered too old*, not too young. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484 (1999) (relying on

legislative findings enacted as part of the Americans with Disabilities Act to show congressional intent).

These statements of legislative findings demonstrate that Congress did not intend to allow *every* worker age 40 and over to claim age discrimination simply because she or he is a member of the ADEA-protected class. Rather, the statute prohibits employers from arbitrarily favoring younger workers over older ones based on inaccurate and harmful stereotypes that as individuals age, they become less able in the workplace.

The ADEA's language protecting "older employees" thus is a comparative term, not an absolute one. Interpreting this term, this Court ruled in its unanimous opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), that the appropriate test for illegal age discrimination under the ADEA is the replacement of the plaintiff by someone who is *substantially younger*, but who need not be outside the protected class, *i.e.*, under 40 years of age. "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id.* at 313.

The Court observed that a test which merely looked at whether or not the comparator is in the protected class would permit a 40-year-old plaintiff who is replaced by a 39-year-old to claim age discrimination simply because the plaintiff is one year older. In practice, the Court said, this type of case was rare, "since the vast majority of age-discrimination claims come from *older employees*." *Id.* at 312 (emphasis added). Nevertheless, the Court rejected this standard as a reliable indicator of age bias.

Requiring a comparison to a substantially younger worker to establish a prima facie case of age discrimination thus

shows that the term "older employee" means *older than the comparator*. The Court's distinction between 40-year-olds, who are part of the ADEA's protected class, and "older employees" also shows that the word "older" is a comparative term. "Older" refers to one's age when compared to someone else's, not just to one's chronological age. The Court's focus in *O'Connor* on the plaintiff's older age relative to his replacement thus shows that the plain language of the ADEA requires the discrimination to be in favor of someone *younger* than the plaintiff to be unlawful. The absence of this essential point in the decision below warrants reversal.

2. An employer that favors older employees has not discriminated based on age under the plain language of the ADEA

Relying on the plain language of the ADEA, the Seventh Circuit ruled in *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226 (7th Cir. 1992), that the statute does not support a claim for reverse age discrimination. In that case, Caterpillar offered early retirement benefits to workers who were either 60 years or older with 10 years of service, or 55 years or older, if the sum of their years of service and age totaled 85. Caterpillar later modified this plan to extend early retirement benefits also to workers who were 50 years or older with 10 years of service. *Id.* at 1227.

A group of former employees between the ages of 40 and 50 years old who had more than 10 years of service sued Caterpillar for reverse age discrimination because they were *too young* to qualify for the benefits. *Id.* In rejecting the plaintiffs' claims, the Seventh Circuit ruled that the plain language of the ADEA indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored.

> [T]he phrase "arbitrary age discrimination" refers to Congress's understanding that discriminating against *older people* on the basis of their age is arbitrary . . . Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young . . . cannot argue that they are similarly victimized.

Id. at 1228 (citation omitted).

The First Circuit's ruling in *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988), also supports reversal of the decision below. In that case, the First Circuit rejected a worker's claim that a company severance plan, which gave greater benefits to workers with more seniority, violated the ADEA by inducing him to resign.

In an opinion written by then-Judge Breyer, the First Circuit held that the ADEA "does not forbid treating older persons *more* generously than others." *Id.* at 278. The court explained that a company severance incentive package that offered increased benefits to employees with more seniority who resigned voluntarily was a *favor* to them, and thus could not support an age discrimination claim. "That plan was a carrot, not a stick, and . . . a 'carrot' cannot ordinarily violate the Age Discrimination in Employment Act." *Id.* (citation omitted); *see also Walton v. McDonnell Douglas Corp.*, 981 F. Supp. 1273, 1278 n.6 (E.D. Mo. 1997) ("Because the law does not protect employees because they are too young, plaintiff cannot prove age discrimination based upon defendant's retention of older individuals"), *aff'd*, 17 F.3d 423 (8th Cir. 1999); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995) (dismissing ADEA reverse age discrimination lawsuit by teachers between ages of 40 and 50, who were too young to vest in retirement benefits).

In addition, the Ninth Circuit expressed considerable doubt that the ADEA supports a claim for reverse age discrimination in *Stone v. Travelers Corp.*, 58 F.3d 434 (9th Cir. 1995). In that case, a company severance plan permitted only employees over the age of 55 to receive their benefits as a

lifetime annuity. The plaintiff, who was 52 years old, claimed discrimination because he was too young to receive an annuity. Although the Ninth Circuit did not rule on the viability of the plaintiff's reverse age discrimination claim, it described the nature of his claim with disbelief: "Stone claims that Travelers violated the ADEA by discriminating against him because he was too young!" *Id.* at 437. These decisions support the conclusion that a reverse age discrimination claim is not cognizable under the plain language of the ADEA, thereby requiring reversal of the decision below.

3. The EEOC's regulation on comparative age warrants no deference because it is fundamentally inconsistent with both the plain language of the ADEA and the next section of the regulation

The Seventh Circuit in *Hamilton* also properly rejected a regulation promulgated by the Equal Employment Opportunity Commission (EEOC) at 29 C.F.R. § 1625.2(a) that purportedly interprets the ADEA as supporting a claim for reverse age discrimination, because it conflicted with the statute. 966 F.2d at 1228. Subsection (a) states that "It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age . . . ." 29 C.F.R. § 1625.2(a). This provision is contrary to the plain language of the statute, which indicates that the law does not cover claims brought by younger workers over 40 that older workers were favored. *See Section I.A., supra.* As this Court held in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989), "no deference is due to agency interpretations at odds with the plain language of the statute itself."

Moreover, interpreting this subsection to authorize reverse age discrimination suits impermissibly creates a conflict with the next section of the regulation. The regulation's apparent prohibition against any preferences for older workers conflicts directly with § 1625.2(b), which provides that "[t]he extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination." 29 C.F.R. § 1625.2(b). In contrast to § 1625.2(a), the next part of the regulation asserts that there are some situations, particularly in the context of employer-provided benefits, in which it is perfectly appropriate for employers to single out older workers to receive enhanced benefits. The fundamental inconsistency between the two sections in § 1625.2 thus creates a great deal of uncertainty for employers as to whether they lawfully may offer additional benefits to older workers. The confusion makes § 1625.2(a)'s statements against any preferences for older employees inherently unpersuasive, thereby precluding any deference from this Court to them. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (consistency and persuasiveness of agency's position are two factors relevant to determining amount of deference courts should give).

B. Reverse Discrimination Claims Are Fundamentally Incompatible With The ADEA's Legislative History, Which Focuses On The Particular Problems Faced By Older Employees Relative To Younger Ones

The legislative history of the ADEA is replete with explanations that the purpose of the bill was to promote employment opportunities for *older* workers.[2] The congres-

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[2] *See, e.g.*, H.R. Rep. No. 90-805, at 4, 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214-17.

sional debate accompanying passage of the ADEA reveals the intent to combat inaccurate and harmful stereotypes of an older worker as "an inflexible person, in physical decline, capable of only low productivity, [which] bars the employer from a fair evaluation of the applicant's actual ability and performance record." 133 Cong. Rec. H16,170 (daily ed. Dec. 4, 1967) (statement of Rep. Olsen).

In fact, Congress deliberately chose not to establish an age threshold lower than 40 for membership in the protected class. Congress specifically felt "a further lowering of the age limit proscribed by the bill would lessen the primary objective; that is, the promotion of employment opportunities for older workers." H.R. Rep. No. 90-805, at 6 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2219. By recognizing reverse discrimination claims under the ADEA, the decision below similarly frustrates the primary goal of the ADEA to protect older workers and must be reversed.

Subsequent amendments to the ADEA further evidence the intent to protect older workers from discrimination in favor of younger employees. When Congress amended the ADEA by passing the Older Workers Benefit Protection Act of 1990 (OWBPA), P.L. 101-433, it was understood that the ADEA did not require employers to provide the same benefits for younger workers in the ADEA-protected class as older workers. For example, in describing a "wide variety" of early retirement incentives that were lawful under the ADEA even prior to the OWBPA amendments, the Statement of Managers that accompanied the Act noted that the ADEA allows "a plan that gives employees who have attained age 55 and who retire during a specified window period credit for 5 additional years of service and/or age . . . ." 136 Cong. Rec. H8614, H8619 (daily ed. Oct. 2, 1990) (Statement of Managers). The example is premised on the interpretation that the ADEA allows an employer to limit employee benefit enhancements to workers who are age 55 and older. In contrast, the Sixth Circuit's

interpretation would require that benefits be uniform for all workers in the ADEA-protected class. This result is inapposite with the ADEA's legislative history demonstrating Congress's intent to protect older workers from employment discrimination because of the negative stereotypes associated with their advancing age, stereotypes that are absent when an employee is considered too *young*.

Moreover, the extensive legislative history on which this Court relied in *EEOC v. Wyoming*, 460 U.S. 226 (1983), to hold that the ADEA covered state and local governments also supports the proposition that the ADEA was designed to protect "older" workers vis-à-vis younger ones. The Court specifically cited with approval the findings of a 1965 report by then-Labor Secretary W. Willard Wirtz on older American workers that showed age discrimination "was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. . . ." *Id.* at 231.[3]

The Secretary's Report detailed the problems facing older workers in the U.S., where over half of all employers used an age ceiling from 45 to 55 when hiring new employees, regardless of the applicant's qualifications, and workers over 55 years of age were automatically excluded from over one half of all job openings in private companies. Secretary's Report, at 6. The Secretary also noted that workers age 45 and over were unemployed for eight weeks longer than workers under age 45. *Id.* at 18. The Secretary's conclusion

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[3] United States Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-219 (1965) (hereinafter cited as "Secretary's Report").

that workers were having more difficulty obtaining new jobs as they grew older thus was a compelling reason for enacting the ADEA.

The same concerns that underlay the Secretary's Report in 1965 remain valid for older workers today. According to AARP, older workers, defined as those aged 55 and above, typically continue to take longer than younger employees to find a job. AARP, *Update on the Older Worker: 2001* (Apr. 2002).[4] More specifically, job seekers aged 50 and over took on average *50% longer* to find a new job in 2002 than workers under the age of 50.[5] Moreover, even when older workers found another job, they were more likely to suffer a pay cut than younger employees. While close to 55% of workers younger than age 55 found another job in which they earned the same or more than in their previous position, only 47% of workers age 55 or older could say the same.[6] These data confirm that "older" workers continue to experience more problems in the workplace than younger ones, and thus support the ongoing need to interpret the ADEA to prohibit only situations in which older workers are discriminated against in favor of their younger colleagues.

[4] The report is available at *http://www.research.aarp.org/econ/dd69_worker.html*.

[5] Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002) (micro-data records public use file available at *http://www.bls.census.gov/cps/cpsmain.htm*).

[6] Employment Policy Found., Tabulation of Bureau of Labor Statistics data gathered by the United States Dep't of Labor, Employment & Training Administration and reported in "Worker Displacement 1991-2001" (Aug. 21, 2002).

C. The Negative Stereotypes That Congress Intended The ADEA To Combat Are Absent In Employment Actions That Benefit Older Workers

This Court explicitly recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that Congress intended the ADEA to protect older workers from inaccurate and damaging stereotypes about their ability to work. In *Hazen Paper*, the Court explained that "the very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." 507 U.S. at 610 (citation omitted).

This Court therefore ruled in *Hazen Paper* that an employer's termination of an employee to prevent his pension benefits from vesting was lawful under the ADEA, because the termination was not based on negative stereotypes about older workers. The absence of the offensive stereotype against older workers thus meant the employer's conduct did not violate the ADEA. "The prohibited stereotype ('Older employees are likely to be ___') would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age . . . ." *Id.* at 612.

Likewise, an employer that favors older workers over younger ones is not acting based on inaccurate and negative stereotypes about older workers, and therefore also has not violated the ADEA. For this reason, the D.C. Circuit has refused to infer unlawful age bias when a plaintiff failed to show that a challenged employment decision was based on disparaging stereotypes about older workers. In *Paquin v. Federal National Mortgage Association*, 119 F.3d 23 (D.C. Cir. 1997), the D.C. Circuit rejected the plaintiff's claim that

his employer's criticism that he lacked creativity and was stubborn was evidence that he was terminated based on his age. As the court noted, those opinions were not based on negative stereotypes about older workers. 119 F.3d at 31. As such, "a decision not 'derived from stereotypical preconceptions about older people[],' does not support an inference of age discrimination. . . . To prevail, Paquin must present evidence that the statements in fact spring from stereotypes." *Id.* (internal citation omitted).

In this case, the lower court's decision that the ADEA supports a claim for reverse age discrimination fails to advance the rationale behind the ADEA of combating the harmful stereotypes that plague older workers. By prohibiting an employer from favoring older employees over younger ones, the decision below leaves intact the erroneous and damaging preconception that their advancing age makes older workers less productive and valuable in the workplace, the precise evil that the ADEA was intended to eliminate. Because the decision below ignores the language and purpose of the ADEA, it must be reversed.

II. THE DECISION BELOW SEVERELY PREJUDICES EMPLOYERS BY SUBJECTING THEM TO SIGNIFICANTLY MORE, AND POTENTIALLY CONFLICTING, DISCRIMINATION CLAIMS OVER PERSONNEL ACTIONS

The Sixth Circuit's decision will increase significantly the pool of potential claimants alleging age discrimination, and thus the number of claims to which employers must respond. Unlike the immutable characteristics covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, age is a progressive condition that affects everyone. Most workers eventually will attain the age of 40, joining the growing class of individuals protected under the ADEA. On average, 11,684 people (5816 men and 5868 women) in the United

States will turn 40 every day in 2003.[7] By expanding the ADEA to include reverse age discrimination claims, the Sixth Circuit allows every one of these workers to look at their older coworkers in addition to younger ones as potential comparators, vastly increasing the number of potential claims they can make.

Collectively, *amici's* member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with Title VII, the ADEA, and other applicable legal requirements.

Nevertheless, each employment transaction involving a worker who is age 40 or over is a potential subject of a discrimination charge and/or lawsuit. This prospect is true because each time an employer makes a decision to hire an applicant or promote an employee, for example, there is likely to be at least one candidate who was not selected for the job. In many cases, there will be several candidates who have been rejected. If a candidate is substantially older than the individual selected, the candidate probably can establish a prima facie case of age discrimination. The decision below allows candidates who are substantially *younger* than the person selected also to establish a prima facie case of age discrimination as well, thereby vastly increasing the number of individuals who may claim unlawful age discrimination.

Thus, following every hiring decision, every candidate who was not selected can identify a comparator who is *either* older

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[7] Employment Policy Found., Tabulation of Census Bureau/Bureau of Labor Statistics Current Population Survey (Nov. 2002) (microdata records public use file available at *http://www.bls.census.gov/cps/cpsmain.htm*).

or younger, and was treated differently. That means that virtually every plaintiff will be able to establish a prima facie case of discrimination, thereby shifting the burden to the employer to articulate a legitimate, nondiscriminatory reason for the employment action that the plaintiff may attempt to show is a pretext. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The decision below could lead to absurd results. For example, an employer that hires a 50-year-old from a pool of applicants of various ages may receive multiple claims of age discrimination, all challenging a single employment action. Some plaintiffs may allege they were not hired because they were too old, while others claim they were rejected because they were too young. As long as a substantial age difference existed between the person selected and the plaintiff, both older and younger plaintiffs probably would establish a prima facie case of age discrimination. Thus, an employer could be sued for discriminating against both older and younger applicants at the same time.

Although the prima facie test is not an onerous one, it does weed out clearly unmeritorious claims. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Under the Sixth Circuit's ruling, however, a prima facie case would exist every time any comparator was either substantially younger *or older* than the plaintiff. Unless this Court reverses the decision below, employers will be forced to defend themselves against significantly more age discrimination complaints. While these employers ultimately may be able to articulate legitimate, nondiscriminatory reasons for their employment actions, they still must undergo a lengthy and expensive process to refute each charge of discrimination.

Moreover, as a practical matter, the Sixth Circuit's decision effectively eliminates an important defense for employers to an age discrimination suit. One way an employer may defend

against a claim under the ADEA that it discriminated against an older worker because of his age is to show that it actually treated the older worker *better* than a younger one. In *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420 (4th Cir. 2000), for example, the Fourth Circuit held the employer did not violate the ADEA by requiring the 56-year-old plaintiff to choose between receiving a lump-sum severance payment or a special retirement option as part of a lay off. As the court pointed out, the plaintiff was treated *better* than his younger coworkers, who received only the severance benefit. *Id.* at 426.

While this defense may defeat the older worker's age discrimination claim, it also would *prove* a reverse discrimination claim by a younger employee who is within the ADEA-protected class under the Sixth Circuit's decision. The potential liability for reverse age discrimination created by this defense may lead employers to forsake the defense completely.[8] This Court must reverse the decision below to

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[8] The Sixth Circuit's recognition of a cause of action for reverse age discrimination poses problems not only for employers defending against disparate treatment cases, but also where a plaintiff alleges a disparate impact based on age. This Court has never recognized that a disparate impact cause of action exists under the ADEA. *Hazen Paper*, 507 U.S. at 610. Likewise, the Sixth Circuit has not ruled on the viability of a disparate impact claim under the ADEA. That court, however, is currently considering on appeal a case that raises this issue. *Sitko v. Goodyear Tire & Rubber Co.*, No. 02-4083 (6th Cir.).

If the Sixth Circuit were to rule that disparate impact claims are cognizable under the ADEA, allowing "reverse" age discrimination would only complicate matters. To monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, both older and younger. This analysis would be overly burdensome on employers, and ultimately meaningless. Since the age of the employee population is constantly changing, developing an accurate picture of the effect of a particular employment practice on employees of different ages will be impossible.

avoid subjecting employers to an increased number of, and potentially conflicting, age discrimination claims and curtailing their ability to defend against these claims.

III. THE DECISION BELOW JEOPARDIZES EMPLOYER-SPONSORED BENEFIT PLANS

A. Employers Need Flexibility To Offer Enhanced Welfare Benefits To Workers Who Need Them The Most

1. Employers commonly offer enhanced welfare benefits to older employees

The decision below jeopardizes the operation of employee benefit plans offered by *amici's* member companies. The most profound effect of the Sixth Circuit's ruling would arise under employer welfare arrangements, including retiree health programs. The ruling calls into question common employer practices that benefit the oldest workforce employees. For example, employers may provide enhanced welfare benefits (such as severance pay or medical coverage) to older employees in the ADEA-protected class when there is a reduction in the workforce or a fundamental change in the employer's benefit program. An employer that has a reduction in force might provide a higher level of subsidy or enhancement in medical coverage to older departing employees, *e.g.*, age 50 or older, in an effort to help bridge these workers until they become eligible to receive pension benefits or Medicare coverage. Like General Dynamics, employers forced to reduce future retiree health benefits may elect to keep the same level of retiree health benefits or provide a better transition benefit for older employees while applying the new terms to all other workers.

The employer's decision to provide greater benefits to those workers who are at or closest to retirement age recognizes that, as a practical matter, older workers may be impacted more significantly by benefit changes. Workers on

the cusp of pension eligibility may have begun to plan their retirement in anticipation of receiving retiree medical coverage. While such voluntary enhancements or transition benefits are highly beneficial to older workers, they would appear to be unlawful under the Sixth Circuit's ruling.

2. Limiting an employer's flexibility to offer enhanced welfare benefits to older employees may result in an overall reduction of benefits

If the Sixth Circuit's ruling stands, it could have the perverse effect of further reducing the availability of retiree health benefits for all workers. A 2002 nationwide survey of 435 large employers revealed that the cost of providing retiree health benefits increased an estimated 16% from the previous year, from $12.5 billion in 2001 to an estimated $14.5 billion in 2002. *The Current State of Retiree Health Benefits: Findings from the Kaiser/Hewitt 2002 Retiree Health Survey* (Dec. 2002) (hereinafter referred to as the "Kaiser/Hewitt Survey").[9] Together, these employers offer health benefits to approximately 18.5 million workers and family members and 5.4 million retirees and family members. *Id.* at 58. For them, the increase in the cost of providing retiree health benefits outpaced that of providing health benefits to active workers. *Id.* at 10. Rising costs already have caused some employers with fixed budgets to modify their retiree health coverage. Over the past few years, many large employers already have raised retiree contributions to premiums and the amounts of the insureds' deductibles and co-payments. *Id.* at 37-38.

The increased likelihood that employers will face lawsuits under the ADEA over *any* differential in their benefit plans, including those that actually favor their oldest workers, will

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[9] The survey is available at *http://www.kff.org/content/2002/20021205a/6061v4.pdf.*

exacerbate the pressure to control cost by eliminating these programs altogether. Even if the employer ultimately prevails, mounting a defense to an ADEA lawsuit can be prohibitively expensive.

No federal law requires employers to provide workers with pension or health benefits, or prevents them from reducing or eliminating completely such benefits. However, many employers voluntarily choose to provide such benefits to their workers as a perquisite of employment. To minimize the risk of lawsuits under the ADEA, prudent employers simply may choose not to offer benefits that are likely to be challenged, such as retiree health insurance. In fact, 13 percent of the large employers surveyed already have terminated health benefits for *future* retirees (often new or recent hires) in the past two years, and 22 percent predicted that they were likely to do the same in the next three years. *Kaiser/Hewitt Survey*, at 37, 43. By exposing employers that provide retiree health benefits to greater risk of litigation, the decision below may drive more employers to scale back further their coverage or abandon it altogether. This action would make it significantly harder for older individuals to obtain adequate health insurance coverage. Since older workers often must pay significantly higher premiums for coverage under individual health insurance policies than under an employer's group health plan, some individuals may find the insurance prohibitively expensive, forcing them to become uninsured. To avoid dramatically increasing the number of uninsureds in this country, this Court must reverse the decision below to preserve an employer's flexibility to manage its voluntary benefits programs.

B. Allowing Reverse Age Discrimination Claims Could Negatively Impact Employee Benefit Pension Plans

While the Sixth Circuit's ruling affects retiree health and employer welfare plans most dramatically, *amici*'s member

companies also have concerns about the operation of their employee benefit pension plans if reverse age discrimination is a cognizable claim under the ADEA. Under current law, section 623(l)(1)(A) of the ADEA allows employee benefit pension plans to condition the payment of normal or early retirement benefits on the attainment of a certain age. 29 U.S.C. § 623(l)(1)(A). Presumably, this specific exception for pension plans would not be affected by the Sixth Circuit's ruling.

Retirement plans may include other provisions contingent upon age, however, that may not be covered by the exception in § 623(l). For example, in defined contribution plans, such as a "401(k)" or similar arrangements, some plans may limit the ability to take in-service withdrawals before retirement to participants who have attained age 50 or above. Another example is the Internal Revenue Code provision requiring certain tax-qualified plans holding employer securities to allow participants who have attained age 55 and have 10 years of participation to diversify the assets in which their accounts are invested. 26 U.S.C. § 401(a)(28)(B)(iii). There may be uncertainty as to whether a plan that incorporates the Internal Revenue Code § 401(a)(28) rule violates the ADEA by not providing similar diversification rights to younger workers in the ADEA-protected class.

In addition, the Sixth Circuit's ruling also casts doubt on another common practice that is recognized by Treasury Department regulations. Many defined contribution plans (including target benefit plans) are "age-weighted" so that larger contributions are made for older participants than for similarly-situated younger employees. *See, e.g.*, 26 C.F.R. § 1.401(a)(4)-8(b). Whether plans that contain this feature unlawfully discriminate against younger workers in the ADEA-protected class is also unclear under the Sixth Circuit's decision.

If, as the Sixth Circuit's rulings suggests, the benefits, rights, and features in employee benefit plans must be

uniform for all employees age 40 and over, numerous plan designs that have long been assumed to be lawful under the ADEA now would need to be reconsidered. As with retiree health plans, employers voluntarily offer pension plans to their employees as an added benefit of employment. The risk that an employer may be sued over one of these pension plan arrangements, however, may cause it to cut back or eliminate the program all together. The end result may be a diminution of the benefits that are provided to the oldest employees in the workforce, a perverse outcome under a statute that was intended to protect older employees. This Court must reverse the Sixth Circuit's decision to avoid inadvertently causing a reduction in the benefits that employers voluntarily make available to older workers, which would only compound the problems that older workers face in the workplace.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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